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VIA ECF AND E-MAIL (CronanNYSDChambers@nysd.uscourts.gov)

Honorable John P. Cronan, U.S.D.J.
United States District Court
Southern District of New York
500 Pearl Street, Room 1320
New York, NY 10007

**Re: *Klein v. Jelly Belly Candy Company*
Docket No. 1:22-CV-05629 (JPC) (JLC)**

Dear Judge Cronan:

On behalf of Defendant Jelly Belly Candy Company (“Jelly Belly”), we write in response to the Court’s August 18, 2022 Order (Dkt. No. 24).

Fed. R. Civ. P. 41(a)(1)(A)(i) permits a plaintiff to voluntarily dismiss a complaint by notice before the defendant serves either an answer or a motion for summary judgment. Jelly Belly has not filed an answer or motion for summary judgment, and the filing of a motion to dismiss generally will not cut off a plaintiff’s ability to file a notice of voluntary dismissal.

However, the decision by Plaintiff and his able counsel not to pursue dismissal by notice under Fed. R. Civ. P. 41(a)(1)(A)(i), we assume, was intentional to attempt to avoid sanctions. Fed. R. Civ. P. 41(d) provides that, when “a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant,” the court may “order the plaintiff to pay all or part of the costs of that previous action,” Fed. R. Civ. P. 41(d)(1), including attorneys’ fees incurred in defending the first action. *See Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 26 (2d Cir. 2018). This rule “serves the broader purpose of penalizing a plaintiff for refileing the very suit he has previously dismissed.” *Adams v. N.Y. State Edu. Dep’t*, 630 F. Supp. 2d 333, 343 (S.D.N.Y. 2009). Its “clear and undisputed” purpose is directly applicable here: “to serve as a deterrent to forum shopping and vexatious litigation.” *Horowitz*, 888 F.3d at 25; *see also Pelczar v. Pelczar*, No. 16-CV-55 (CBA) (LB), 2017 WL 3105855, at *2 (E.D.N.Y. July 20, 2017) (permitting voluntarily dismissal by notice but warning *pro se* plaintiff of the consequences of refileing the same claims in another jurisdiction); *BH Seven, LLC v. Ambit Energy, L.P.*, No. 11-CV-2483 ARR RER, 2012 WL 4445825, at *2 (E.D.N.Y. Sept. 25, 2012) (same).

Plaintiff chose not to simply file a notice of dismissal under Fed. R. Civ. P. 41(a)(1)(A)(i), perhaps acknowledging that doing so would rise to a level of gamesmanship that will surely subject him to sanctions. However, should Plaintiff pursue his intended forum shopping strategy to avoid New York’s statute of limitations by voluntarily dismissing this action (by motion or notice) and refileing it elsewhere, Jelly Belly reserves the right to recover the fees and costs it incurred in defending this action in New York.

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We thank the Court for its attention to this matter and its consideration of this letter.

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: /s/ **Eric D. Wong**

Eric D. Wong

Attorneys for Defendant

cc: Counsel of Record via ECF